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No. 95-260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIU INSURANCE CO., *et al.*,

Petitioners,

v.

W. R. GRACE AND COMPANY-CONN., *et al.*,

Respondents.

On Petition for a Writer of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners AIU Insurance Co. *et al.* respectfully submit this reply brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

1. Grace makes no effort to refute petitioners' showing (Pet. 10) that the Fifth Circuit consistently reviews contract formation questions only for clear error. *See, e.g.*, *Boudreaux v. ABC Insurance Co.*, 689 F.2d 1256, 1260 (5th Cir. 1982) ("[w]e must assume the existence of a[] . . . contract . . . unless the district court's finding to that effect was clearly erroneous"); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 997 (5th Cir. 1976) ("The district court's finding that a contract was formed is

. . . not clearly erroneous.").[1] Instead, Grace argues (Br. in Opp. 3-5, 7-8) that review is not warranted in this case because the court of appeals applied the clear-error standard only to the factual issue of the parties' intent.

Contrary to Grace's contention, however, the issues before the court of appeals were not limited to the question of the parties' intent. Instead, as the court of appeals itself recognized, "[t]he issue is whether there was an enforceable agreement." As explained in the petition (Pet. 7, 20) without contradiction from Grace, resolution of that issue required the court to construe New York contract law--including statutes precluding enforcement of unsigned settlement agreements--and to apply that law to the facts. Application of law to fact is, by definition, a mixed question of fact and law, yet the court of appeals made absolutely clear that it reviewed the district court's decision only for clear error: "[T]his presents a close issue of fact. The findings of the district court were not clearly erroneous." Pet. App. 5a. The only possible conclusion to be drawn from the court of appeals' opinion is that, in keeping with binding Fifth Circuit precedent, the court reviewed the ultimate question of contract formation only for clear error. Accordingly, this case squarely presents the question of the appropriate standard of review, and Grace's contentions to the contrary are without merit.

2. Grace also errs in denying (Br. in Opp. 6-7) that the circuits are divided over the question presented by this

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[1] Grace does contend that "the Fifth Circuit reviews mixed questions of law and fact de novo." Br. in Opp. 7. The cases cited by Grace for this proposition, however, do not involve contract formation issues, and are therefore inapposite. *See, e.g., Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442 (5th Cir. 1988) (reviewing question whether corporation had "localized" its business activities in a particular State); *Amoco Transport Co. v. S/S Mason Lykes*, 768 F.2d 659, 663 (5th Cir. 1985) (reviewing question whether ocean carrier's decision to abandon a voyage was reasonable); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983) (reviewing question whether individuals were employees or independent contractors).

petition. According to Grace, where "the question [of contract formation] turns on the consideration of extrinsic evidence, then the district court's finding will be one of fact, reviewable only for clear error." Br. in Opp. 6. Grace's characterization is certainly consistent with the law of the Fifth Circuit, but it is squarely contrary to the approach followed by other circuits. Indeed, the Eleventh Circuit addressed itself to precisely this situation and reached precisely the opposite conclusion: "In drawing conclusions from subsidiary facts the ability of the trial court to apply the law properly becomes more significant than its peculiar advantage in judging the weight of the evidence. Thus, it is logical for the reviewing court to treat ultimate facts as matters of law that it may determine independently." *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 447 (11th Cir. 1982). The *Augusta Aviation* court accordingly applied de novo review to the question whether the extrinsic evidence, including "the amount of money promised and paid" and "the sequence of events," demonstrated the existence of a binding contract. *Id.* at 448.

Likewise, in *Daly Const., Inc. v. Garrett*, 5 F.3d 520 (Fed. Cir. 1993), the court applied de novo review in determining whether a series of negotiations between the parties gave rise to a binding contract. The court explained that "[w]hether there was a binding agreement flowing from this negotiation is a question of law." *Id.* at 521. *Accord A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1580-81 (Fed. Cir. 1994) (holding that the question whether a document "constituted a binding contract between the parties" is "a question of law," and concluding that "*[o]n the facts of this case*" a contract has been formed) (emphasis added).

Thus, it is clear that some courts of appeals--unlike the court below--will apply de novo review in answering the ultimate question whether, given the particular facts of each case, a contract has been formed. Other courts, including the First and Fifth Circuits, follow the rule advocated by Grace. Review is warranted to resolve this widening conflict.

3. Finally, Grace also errs in asserting (Br. in Opp. 8) that this case does not warrant review because it "largely

involves state law issues of contract interpretation." The question raised in the petition is one of federal, not state, law, and it arises with great frequency in contract cases and, more generally, in a wide variety of cases involving mixed questions of law and fact. Indeed, Grace does not and cannot dispute the existence of a wide circuit split over the general approach to be taken to determining the standard of review for mixed questions. As noted in the petition (Pet. 19), this Court has frequently granted certiorari to resolve similar questions of the appropriate standard of review to be applied to particular issues, and the same result is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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